No. 2613

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

S. T. HILLS, as Trustee of the Estate of Max Joseph, doing business as Workingmen's Clothing Store, Bankrupt,

Petitioner,

vs.

MAX JOSEPH, doing business as Workingmen's Clothing Store, Bankrupt,

Respondent.

No. 2613.

OPENING BRIEF OF PETITIONER.

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STATEMENT.

On March 22, 1915, Max Joseph was adjudged a bankrupt in the District Court of the United States, for the Western District of Washington, Northern Division, and the matter was thereupon

referred to Honorable Robert McMurchie, Referee in Bankruptcy.

Petitioner herein was thereafter elected and qualified as trustee, in the matter of said bankruptcy.

The bankrupt, in the schedules attached to the petition for adjudication, claimed as exempt certain specified dry goods and clothing, then constituting part of a general stock of merchandise, in lieu of the animals mentioned in Subdivision 4, Section 563, Rem. & Bal. Codes of the State of Washington, which such subdivision of the statute of Washington is as follows:

"To every householder two (2) cows with their calves, five (5) swine, two (2) stands of bees, thirty-six (36) domestic fowls and provisions and fuel for the comfortable maintenance of such householder and family for six (6) months; also feed for such animals for six months:

"Provided that in case such householder shall not possess or shall not desire to retain the animals above named he may select from his property and retain other property not to exceed two hundred fifty and no/100 ($250.00) dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three and said selection shall have the same effect as selections made under subdivision three of this section."

Thereafter the petitioner herein filed with the referee an order, refusing to set aside the claimed lieu exemptions.

The entire stock of merchandise of the bankrupt, in which was comprised the specific articles claimed by him as exempt were sold, by the petitioner pursuant to an order of the referee, there being a stipulation, however, between the petitioner, and the bankrupt, proved by the referee, that in case the lieu exemptions were allowed by the court, as claimed, the sum of $250.00 should be allowed in cash, instead of specific articles.

Thereupon the bankrupt filed his execptions to the order of the trustee, refusing to set aside the claimed lieu exemptions, and thereafter upon hearing, the referee made and filed his order reversing the order of the trustee refusing to set aside the claimed lieu exemptions, and directing, pursuant to the stipulation, the payment by the trustee to the bankrupt of the sum of $250.00, from the monies derived from the sale of the general stock of merchandise.

Thereafter the trustee, petitioner herein, filed a petition to review the order of the referee, and thereupon the referee certified the whole record in

the matter of said order, to the District Court, whereupon a hearing was had, and the district judge duly made and filed his order affirming the order of the referee, which reversed the order of the trustee, refusing to set aside the claimed lieu exemptions.

No question of fact is involved herein. It is solely and purely a question of law as to the construction to be placed upon Subdivision 4, Section 563, Rem. & Bal. Codes of Washington, and the doctrine in reference to such subdivision enunciated by the Supreme Court of the State of Washington.

ASSIGNMENT OF ERRORS.

I.

The district judge erred in the making of the order in this matter, filed May 20, 1915, affirming the order of the referee, which order of the referee reversed the order of the trustee, and which order of the trustee refused to set aside to the bankrupt claimed lieu exemptions. (Record, pp. 19-20.)

ARGUMENT.

The question for the consideration of this court is in very small compass, and it involves the construction placed upon a state statute by a State Appellate Court, and whether such construction will be followed by this court.

The Bankruptcy Act, Section six (6), allows to a bankrupt the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile, etc. The particular state statute with which we are concerned is Subdivision 4, of Section 563, Rem. & Bal. Codes of Washington, which has been set out in full in the Statement of Facts, and we are concerned more particularly with this portion of such subdivision:

"Provided, that in case such householder shall not possess, or shall not desire to retain, the animals above named he may select from his property, and retain other property not to exceed $250.00 in coin in value."

The bankrupt in this instance not possessing the animals named in the subdivision, selected from his general stock in trade goods of a scheduled and stated value of $250.00 in lieu of these animals.

The trustee's position is that such selection is not within the language of the exemption act heretofore quoted, and such we understand to be the holding of the Supreme Court of Washington in the case of

Creditors' Collection Association vs. Bisbee, et al., 80 Washington, 358; 141 Pacific, 886.

The court in that case, considering the meaning of Subdivision 4, of Section 563, the precise subdivision which is here to be passed upon, say:

"The words, 'other property,' appearing in the proviso of Subdivision 4 can refer only to other property of a *like nature* to that specifically mentioned under a well-known rule of statutory construction." (The italics are ours.)

In that case debtor did not possess animals mentioned, and claimed in lieu thereof, money, or rather a debt from the Northern Pacific Railway Company, to the debtor, in the sum of $151.52.

In that case the subject of the exemption claim was a debt, owing from a railway company to the debtor. In this case the exemption claim is made upon and out of a stock of goods in lieu of animals.

The Supreme Court of the state say that the lieu clause exemption must by a common rule of statutory construction be held to apply to other property of like nature, and it held that a debt, or the money grown from the debt, was not other property of a like nature.

Is it possible here to hold that manufactured clothing is of a like nature with cows, calves, swine, bees and domestic fowls? Such a holding would seem to violate every rule of construction.

The substantive exemption allowed the debtor by Subdivision 4 is animals living, moving and breathing. The Supreme Court of the state says that if he has not those animals he can, under the lieu clause, select other property of like nature.

Must not then, under the decision of the Supreme Court, his selection be confined under the lieu clause to living, breathing, moving beings, or will this court say that clothing, manufactured, with no breath of life in it, is of a like nature with cows, calves, swine, bees and hens.

This opinion but follows the doctrine of the Supreme Court in the earlier case of *Carter vs. Davis,* 6 Washington, 327; 33 Pacific, 833.

The Supreme Court in the case last cited was called upon to construe Subdivision 3, of Section 563, Rem. & Bal. Codes.

In that case the debtor claimed as exempt $250.00, proceeds of the sale of live stock, levied upon by the sheriff, none of which was claimed to be exempt at all, and also the sum of $165.00, the proceeds derived from the sale of two horses, and in that regard the Supreme Court says:

"The claim to this $250.00 in the hands of the sheriff is manifestly unfounded in law. The sec-

tion of the statute referred to authorizes the selection of 'other household goods, utensils and furniture,' and prescribes the method and by whom such property may be selected, but confers no right to retain or select other property of a *different character* in lieu of that authorized to be selected and retained." (The italics in the above quotation are ours.)

So that it will be seen that the Supreme Court of the state, twenty-two years ago, in construing a portion of the exemption statute, which was then the same prescisely as it is now, and a portion of this particular section here in question, announced the doctrine to be that under a lieu clause property of like character alone could be selected by the debtor.

Judge Rudkin, in *In re Scheier, et al.,* 188 Federal, 745, where the question before him was, "should the bankrupt be allowed by virtue of Subdivision 4, Section 563, to retain from the partnership assets any property, in lieu of insufficient provisions and fuel for the comfortable maintenance of himself and family for six months," held that the question must be answered in the negative, for a reason stated in answering another question in the same matter, and for the additional reason

"That the statute does not permit the debtor to select other property in lieu of provisions and fuel

for his family, and feed for the animals therein named."

But this court has, we think, determined conclusively the question here presented, in *In re Gerber,* 186 Federal, 693, opinion by Judge Ross, and in that opinion this court cites as authority the opinion of the Supreme Court of Washington in *Carter vs. Davis,* heretofore cited in this brief, and also in *United States Fidelity Co., etc., vs. Hollingshead,* 51 Washington, 326; 98 Pacific 749.

And this court deduces from the opinion in the case of *Carter vs. Davis* the doctrine:

"If as the court there held the right given by the Washington statute to select 'other household goods, utensils and furniture,' in cases provided for, was confined to other property of the same kind, and conferred no right to retain or select other property of a different character in lieu of that authorized to be selected and retained."

It would seem to follow necessarily that the same construction must be given to like provisions contained in Subdivision 4, Section 563, Rem. & Bal. Codes of Washington.

So that this court has held that a selection of exemptions under a lieu clause, either in Subdivision 3, or Subdivision 4, of Section 563, Rem. & Bal. Codes, must be property of like character, and it seems that it would need little argument to demon-

strate the correctness of the doctrine, not only of the Supreme Court of the State of Washington, but of this court, for Subdivision 3 confers upon the debtor the right to specific personal property, and to select other property in lieu thereof, if he does not possess the same.

Subdivision 4 confers the same right upon the debtor. And both the subdivisions have had a construction placed upon them by the highest court of the state.

As Judge Rudkin well says, in the *Scheier* case,

"The decisions of the highest court of the state construing these laws are controlling upon the Federal courts."

And Judge Rudkin uses this language:

"The construction placed upon a statute by the highest court within the jurisdiction of the law making body becomes a part of the statute, and if the legislature cannot add to exemptions without impairing the obligation of existing contracts, certainly no court should accomplish the same result by a mere change in its decisions."

We assume that no one will question the doctrine thus stated. We assume that the constructions placed upon a state statute by the highest court of the state becomes a part of that statute and inheres in it.

We then have demonstrated that the right to a selection of lieu property, given by Subdivision 4, is a right to select only other property of *like character,* and that the selection in this case being a selection in lieu of living, moving, breathing animals and consisting of merchandise comprised in a general stock of clothing, is not a selection of other property of like character.

The district judge in making the order in this case, which is here to be revised, bases his holding upon a prior holding in *In re J. H. Crook,* 219 Federal, 979. In the *Crook* case, the district judge concedes that the construction of a state statute by the decision of the state court of last resort concludes the *nisi prius* Federal Court, but the district judge proceeds to dissect the decision of the Supreme Court in the 80 Washington, and notwithstanding the concession that the holding of the State Supreme Court is binding, declines to follow such holding for the reason, as the district judge says:

> "I am convinced that the only thing that the court desired to say, was that money cannot be selected in lieu of the animals named in the statute."

And this, notwithstanding that the opinion of the State Supreme Court, in the 80 Washington, is plain, as we have cited it before, and we cite it again

for the purpose of urging upon this court that language such as this, *"the words 'other property' appearing in the proviso of Subdivision 4, can refer only to other property of a like nature to that specifically mentioned under a well known rule of statutory construction."*

Is language such as this capable of different meanings? The Supreme Court of the state evidently considered carefully each word of this selection, and it must be held to have expressed the views of that court., for it was adhered to, notwithstanding a petition for rehearing was filed.

We have then the Supreme Court of the state saying that a selection under Subdivision 4 must be of other property of like character, and the district judge saying that it need not be of other property of like character, but cannot be money.

It is of course impossible to reconcile the two decisions. The difference is as wide as the distance between the poles, and as a result we have two constructions of a statute in force in the one state. One construction placed upon it by the State Supreme Court, and the same construction placed upon it by the District Court of the United States, for the Eastern District of Washington, and the other diametrically opposed to it, placed upon it by

the district judge for the Western District of Washington.

It is a question of importance. Neither the debtor, nor the creditor, in view of this conflict between the courts knows what the law is. The rule is of one character where an execution is levied upon a judgement of a state court. The rule is of a precisely different character where bankruptcy proceedings intervene, and yet Congress has said:

"This act should not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws."

In other words, Congress has said the state exemption statute becomes a part of the Federal bankruptcy act, and the courts almost from time immemorial have held that the construction of a state statute placed upon it by the highest court of the state becomes a part of the statute; so it has often been held where one state takes from the statute law of another state a statute, and adopts it *totidem verbis,* that it takes with it the construction placed upon such statute in the state of its original adoption, by the highest court of that state.

The district judge in his opinion in the *Crook* case discusses at some length the doctrine that the exemption statutes should be liberally construed.

We do not question in the slightest that exemption statutes have been held by almost all the courts to be statutes which should be liberally construed.

The poor unfortunate debtor is certainly entitled to a liberal construction of all acts in his favor, but such liberal construction does not authorize the courts to judicially legislate. Courts are for the purpose of construing existing statutes, not for the purpose of changing, altering, or amending existing statutes.

Here the bankrupt, on the record, did not have the animals which he was entitled to claim as exempt. He did have a general stock of merchandise, consisting of clothing from which he claimed in lieu of the animals which he did not have, specific articles of clothing, as merchandise, and not as wearing apparel, upon the ground that these articles of clothing, merchandise and not wearing apparel, were of like character with cows, calves, swine, bees, hens and roosters, and the effect of the order of the district judge, if affirmed, is to hold that coats, pants, shoes, etc., claimed as articles of merchandise, out of a stock, and not claimed as wearing apparel are of like character with cows, calves, swine, bees and domestic fowls. There can

be no other result, for concededly the Supreme Court of the state, the final arbiter in disputes of this kind, has said that the selection must be of articles of like character, and the district judge concedes that the holding of the Supreme court is conclusive, therefore it follows that clothing, inanimate and motheaten, is of like character with cows, calves, swine, bees and domestic fowls, which this court will take judicial knowledge of as being living beings.

Neither counsel in this case, nor this court, have any concern as to whether or not the decision of the Supreme Court of the state is well grounded, or not, and yet it would not be hard to support that decision by large citation of authority, but it being conceded that that decision is conclusive upon the federal courts, and the decision in itself being plain and unequivocal, we do not deem it necessary to take the time to buttress the decision of the Supreme Court of the state by citations.

It is respectfully submitted that the district judge, in his order erred; that the order of the district judge, and of the referee, if revised, must in all things be reversed, and the order of the trustee affirmed and this action is respectfully prayed for.

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